IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS.

CAUSE NO. 177 OF 1997

BETWEEN: (1) THOMAS W. QUINTIN
(2) SANDRA J. WESTPHAL

PLAINTIFFS

AND: (1) PHILLIPS PETROLEUM COMPANY
(2) CIBC BANK AND TRUST COMPANY (CAYMAN) LIMITED

DEFENDANTS

Appearances:
Graham Ritchie and Rosie Whittaker-Myles of Charles Adams, Ritchie & Duckworth for the plaintiffs.
Alan Turner of W.S. Walker and Co. for the first defendant.
James Chapman of Ian Boxall & Co. for the second defendant.

RULING

The plaintiffs now have two judgments in their favour: that of the Court of Appeal exonerating them from any liability under the Max Oil guarantee, the subject matter in Cause 200 of 1993, and that of this Court declaring the

secondary obligations under the letter of guarantee issued in Cause 200 of 1993 by CIBC on their behalf, to be discharged.

The issue before me is whether there should be a stay of the latter judgment pending the appeal which Phillips intends to take in the Court of Appeal against it.

The rule is that a successful party is prima facie entitled to the fruits of his judgment. The onus therefore rests upon Phillips - "full and proper weight must be given to the starting principle that there has to be a good reason for depriving a plaintiff from obtaining the fruits of his judgment": Winchester Cigarette Machinery Ltd v Payne and Another (No. 2) [1993] T.L.T. 15th December 1993 page 647.

The Court of Appeal Law in section 20(3), also makes it clear that the onus lies upon the appellant to show good cause for the imposition of a stay pending appeal.

The fruits of the plaintiffs judgment here would be the funds held by CIBC as security for the guarantee. Where an unsuccessful party is exercising an unrestricted right of appeal, as is Phillips here, it is however, also the duty of the court to make such order as would, in the ordinary case, ensure that that right of appeal is not rendered nugatory by the dissipation of the fruits of judgment in the meantime. An order for the stay of the judgment pending appeal would be the usual order, if the case so demands. Whether

such an order is appropriate is, however, conditional upon whether the appellant can discharge the onus already mentioned in terms of showing a good arguable case or real prospect of success on appeal: Wilson v Church (No.2) (1879) 12 Ch. D. 454. and Linotype-Hell Finance Ltd v Baker [1992] 4 All E.R.

In considering the matter the court must also be satisfied that the appeal is one taken bona fide, ie: in the sense of seeking to exercise a true right of appeal for the meritorious award of the fruits of the appeal and not for some collateral purpose such as seeking to embarrass or to apply pressure to an impecunious respondent to capitulate in the cause.

There are still further considerations: although it would normally be appropriate to order a stay to prevent an appeal with prospect of success being rendered nugatory, there may be circumstances even where the prospect is shown which could justify the court not granting a stay. In each case the court would have to consider where the balance of convenience rests and the trial judge, given his particular knowledge of the case, is best able to weigh the relevant factors and to decide appropriately: Imbar Martina S.A. v Gabor 1988-89 CILR 286.

Bona Fides and Prospects of Success

I do not go so far as to conclude, as urged by Mr. Ritchie, that Phillips does not pursue its appeal bona fide. Although there is often a thin line between an intention to pursue an appeal in bad faith and an intention to pursue an

appeal which has no prospect of success, I can and will accept that Phillips acts on its advice that it has an appeal which it can in good faith pursue here, one with some prospect of success. That, however, is not the view which I take of the merits of its appeal. I am firmly of the view that Phillips has no arguable case.

Its two primary grounds can still be described as:

> (1) lack of locus standi on the part of the plaintiffs and;
>
> (2) that as a matter of contract the terms of the CIBC guarantee extending to cover Phillips appeal to the Privy Council in Cause 200 of 1993, by way of security for any judgment in Phillip's favour upon that appeal.

I have considered the various subgrounds upon which Phillips would seek to rely on appealing to the Court of Appeal against the decision in this court. I have also considered Mr. Turner's painstaking submissions in support of them. While it is always an invidious and uncomfortable situation for one to reflect upon the prospects of any appeal against one's own judgment, I have no difficulty, having done so, in concluding that no such prospect has been shown.

The argument that the plaintiffs should be driven from the judgment seat because they have no locus standi so as fundamentally contrary to natural justice that I do not see how it can be successfully maintained.

That obstacle overcome, I do not see the prospect of the Court of Appeal concluding against the plaintiffs that the guarantee was intended to cover the present situation; ie: where the plaintiffs are the successful parties in Cause 200 of 1993, with Phillips having a judgment against it, seeking to appeal to the Privy Council but nonetheless being entitled under the guarantee to security from the plaintiffs. It is worth noting here again, that Phillips had at least two earlier opportunities to so argue and, in effect, to persuade the Court of Appeal, but chose not to attempt to do so.

As I can see no prospect of success in Phillip's appeal, that would be an end to its application for a stay.

Balance of Convenience

I should nonetheless go on to express my views on the balance of convenience.

Having heard the very extensive cross-examination of the plaintiff, Mr. Quintin upon his affidavit, I do accept that the plaintiffs are severely prejudiced by the letter of guarantee remaining in place.

By that I mean specifically their resultant inability to refinance their business interests. It is clear that the proposal from Cayman National Bank by which they would be able to refinance, is contingent upon the release by CIBC of the funds held as security for the letter of guarantee.

I am also persuaded that the likely result of the letter of guarantee remaining in place would be to prejudice the plaintiffs' ability to instruct their attorneys to fight the appeal to the Privy Council in Cause 200 of 1993 and any further proceedings by Phillips in this Cause.

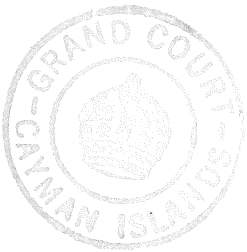
On the other hand, the evidence clearly shows that should Phillips ultimately succeed either in the Court of Appeal in this Cause or in the Privy Council in Cause 200 of 1993, the appeal would not necessarily be rendered nugatory. There are assets owned by the plaintiffs against which judgment could ultimately be executed and their is no evidence that there exists any competing creditor who might move to secure priority over Phillips as against those assets.

To my mind therefore, the balance of convenience falls in favour of the plaintiffs who would be, compared to Phillips, disproportionally disadvantaged by the imposition of the stay.

CIBC

I should not overlook the position of CIBC as a separate party. The concern has been expressed that if CIBC were to release the funds held as security for the guarantee and Phillips were to ultimately succeed in Cause 200 of 1993, Phillips might have legal recourse, but unfairly against CIBC. That would follow as CIBC would be obliged to act only pursuant to the order of this court - the stay order being refused.

The order of this court of which no stay is granted is that declaring to be discharged the obligations under the letters of guarantee. Phillips is also ordered to surrender the guarantee document in order that it might be cancelled by CIBC. The view I take of the matter consistent with the view that an appeal would not be rendered nugatory, is that should Phillips ultimately succeed it will still have recourse to the primary obligors - the plaintiffs. The bank would have discharged its obligations by acting pursuant to the unequivocal order of this court. That, it is clear to me, must be the immediate result of the refusal of an order for a stay of the judgment in this Cause.



Anthony Smellie
JUDGE OF THE GRAND COURT

Dated this 17th day of November 1997